FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 1 1959
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. **750**

FRANK DAVID, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES C. HERNDON,
SAM D. BARTLE,
830 Second National Bldg.,
Akron, Ohio,
ALAN Y. COLE,
815 Fifteenth Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	5
Reasons for Granting the Writ	15
Conclusion	31
Appendix	
A. Judgment of the Court Below	App. 1
B. Decision of the District Court	App. 1

TABLE OF CASES

CASES:

Bergman v. United States (C.A. 6) 253 F. 2d 933	18
Himmelfarb v. United States (C.A. 9) 175 F. 2d 924	26
Holland v. United States, 348 U.S. 121	2, 25, 26, 27, 30
Jencks v. United States, 353 U.S. 657	2, 6, 15, 21, 22, 23
Malone v. United States (C.A. 7) 94 F. 2d 281	26
Mitchell v. United States (C.A. 9) 213 F. 2d 951	26
Scales v. United States (C.A. 4) 260 F. 2d 21	23
Thomas v. Commissioner (C.A. 1) 232 F. 2d 520	30
Tinkoff v. United States (C.A. 7) 86 F. 2d 868	26
United States v. Altruda (C.A. 2) 224 F. 2d 935	25
United States v. Grunewald (S.D.N.Y.) 162 F. Supp. 621	23
United States v. Johnson, 319 U.S. 503	27
United States v. Massei, 355 U.S. 595	2, 27, 30
United States v. Reynolds, 345 U.S. 1	26
Wiborg v. United States, 163 U.S. 632	22

CASES ON THIS COURT'S DOCKET (O.T. 1958):

Galax Mirror Co., Inc. v. United States, No. 491	21
Lev v. United States, No. 435	21

Page

Palermo v. United States, No. 471 ..... 21, 23
Pittsburgh Plate Glass Co. v. United States, No. 489 21
Rosenberg v. United States, No. 451 ..... 21, 23
Rubin v. United States, No. 437 21
Scales v. United States, No. 488 23
Wool v. United States, No. 436 21

STATUTES:

Jencks Act, 71 Stat. 595, 18 U.S.C. § 3500 .... 2, 3, 6, 15, 16, 18, 20, 21, 22

MISCELLANEOUS:

Fifth Amendment, U. S. Constitution 3

Rule 52 (b), Federal Rules of Criminal Procedure .. 22

Rule 40, 1.(d)(2), Revised Rules of the Supreme Court 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

FRANK DAVID, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Frank David, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on February 2, 1959.

OPINIONS BELOW

The Court of Appeals for the Sixth Circuit wrote no opinion. Its order affirming the judgment of the District Court is printed as Appendix A to this Petition. The opinion of the District Court is reported at 168 F. Supp. 269 and is printed as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 2, 1959 (Appendix A). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Were the requirements of the *Jencks Act*, 18 U.S.C. § 3500, satisfied where the Government removed from the statement of the chief Government witness all exhibits, originally attached thereto and referred to therein, and testified to by the witness in his direct testimony, before delivering the statement either to the trial court for an *in camera* inspection, or to Petitioner for his examination and use on cross examination?

2. If the answer to Question 1, *supra*, is in the affirmative, then does the *Jencks Act*, 18 U.S.C. § 3500, as so construed, deny to Petitioner the due process of law guaranteed him by the Fifth Amendment, as determined by this Court in *Jencks* v. *United States*, 353 U.S. 657?

3. Where the Government claims that Petitioner has understated his income for the years prior to the indictment period, is not the Government also required to credit Petitioner for these claimed understatements as a likely source of funds for the indictment years? Does not the failure to include these understatements, or negative them, require—under *Holland* v. *United States*, 348 U.S. 121, and *United States* v. *Massei*, 355 U.S. 595—that the Government prove some other likely source from which Petitioner's alleged net worth increases arose?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The *Fifth Amendment to the Constitution of the United States* provides in relevant part:

> "* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *"

The *Jencks Act*, 71 Stat. 595, 18 U.S.C. § 3500, provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such

delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

A. Proceedings Below

Petitioner was convicted in the United States District Court for the Northern District of Ohio, Eastern Division, on two counts of an indictment which charged him with attempting to defeat and evade a part of his individual federal income taxes for the calendar years 1948 and 1949 in violation of Section 145(b) of the Internal Revenue Code (5a-6a)[1] Petitioner was sentenced to one year and fined $2500.00 on each of the two counts, the sentences to run concurrently (612a), for a total sentence of one year and $2500.

[1] This Petition makes reference to the following: Appendix for Appellant and Appendix for Appellee used in the Court below and accompanying this Petition; the original record of the District Court, on file in the office of the Clerk of this Court; and the Appendix to this Petition which is a part hereof. References to Appendix for Appellant are designated by "a" following the page number; references to Appendix for Appellee are designated by "b" following the page number. References to the Appendix to this Petition are designated by "App." preceding the page number. References to other materials are specifically descriptive.

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on February 2, 1959 (Appendix A, *infra*). Although both Petitioner and Respondent each filed substantial and detailed briefs in the Court of Appeals and took full time on oral argument, and despite the fact that important questions (including a constitutional issue) were raised, the Court of Appeals wrote no opinion. It merely "affirmed upon the grounds and for the reasons stated in the memorandum opinion of the United States District Court * * * " (Appendix A, *infra*).

B. The Jencks Issue

At the conclusion of the direct testimony of the chief Government witness, Special Agent Keller, who headed the investigation of Petitioner, Petitioner moved for an order of the Court—pursuant to 18 U.S.C. § 3500 and *Jencks* v. *United States*, 353 U.S. 657—for production of Keller's report of examination for impeachment purposes (135a-141a). Government counsel at first denied that any such statement existed, and also objected on legal grounds (141a). After a brief *voir dire* examination conducted by Petitioner's counsel, it was established that Keller had submitted a report disclosing the results of his investigation, and that there were exhibits attached to this report (142a, 143a). Petitioner's counsel thereupon again moved for production of the report (142a-143a). The Government continued to oppose,[2] and the Court reserved judgment (144a). On the next succeeding day the counsel for the Government announced "that I have

[2] "We believe that there is no authority, either in law or any case *in that loose statute* that would permit such a disclosure" (144a) (emphasis added).

contacted the Department of Justice and we are now willing to allow counsel for the defendant to examine the report of Mr. Keller" subject to certain conditions (147a). At the Government's request, the Court excised two items from the report and transmitted it to counsel for Petitioner (148a-149a).

When the report was delivered to Petitioner's counsel, he shortly observed that the report made reference to exhibits which were not attached to the report. He thereupon requested

> "that government counsel be required to produce any statements attached to this report of examination of Mr. Keller, the government witness, which relates to the subject matter of currency on hand between the years 1943 to 1949, inclusive, or relating to any purported statements with respect to the subject matter of cash on hand, or to the subject matter of Mr. Keller's testimony on direct examination." (150a-151a).

To the Court's request for clarification, Petitioner's counsel replied:

> "Any statements, your Honor, attached to the report of examination submitted to the government by Mr. Keller, which were made a part of his report of examination." (151a).

To this the Court replied:

> "I don't believe that is a proper request, and I will overrule it." (151a).

C. The Facts

Petitioner was born in Italy in 1906, came to the United States in 1923, and was naturalized in 1930 or 1931. His formal education consisted of

four years of grammar school in Italy, and approximately four months of night schooling in Canton, Ohio. (403a).

In 1933, with savings accumulated from his previous employment as a brick mason, he constructed and operated a small restaurant in Canton, Ohio (404a). In 1947; Petitioner's restaurant building was condemned by the City of Canton and Petitioner was required to build a new restaurant on the same site (406a). Construction was commenced in September, 1948, and completed in July, 1949 (409a). In order to maintain key personnel he set up a temporary operation at another location (369a). This temporary operation proved unsuccessful and he sold the fixtures and equipment in February, 1949, and ceased operating until the new restaurant could open (410a). As a result of the construction, Petitioner was out of business completely during September, 1948 and from February to July, 1949 (341a, 409a, 410a). The new restaurant building was erected at a total cost of $30,680.84 and equipped at a cost of $22,315.37 (534a). All costs were paid for by checks drawn on Petitioner's checking account and reflected in his books and records (248a, 249a, 425a-426a). A loan was obtained from a bank in the fall of 1949 to pay for the fixtures and equipment (426a, 534a-535a). At the trial, the Government took the position that the expenditures for the new restaurant building constituted diverted sales from the Petitioner's restaurant business for the years 1948 and 1949 (41a, 42a, 107a, 166a-167a). Accordingly, the Government reverted to the net worth method of determining Petitioner's income (107a, 166a-167a, 246a, App. 4).

All items included in the net worth of Petitioner as of December 31, 1947, 1948 and 1949, were the subject of stipulation by the parties, with the exception of the items "Currency in Safety Deposit Box and Other" for all years and "Personal Living Expenses" for the year 1947 (533a-535a). The net worth of Petitioner as of December 31, 1943, 1944, 1945 and 1946 was likewise the subject of stipulation by the parties, with the exception of the items "Currency in Safety Deposit Box and Other" and "Personal Living Expenses" (533a, 536a-537a). All of Petitioner's living expenses and non-deductible expenditures for the entire period January 1, 1942 to December 31, 1947, were testified to and accounted for (120a-122a).

In view of the stipulations entered into between the parties, the sole net worth item in issue at the trial was the question of Petitioner's cash on hand.

The investigation for the years here concerned was conducted by Special Agent Keller, the chief Government witness at the trial (94a). He was assisted in his investigation by Deputy Collector Kauffmann, who also testified as a Government witness (94a, 212a). Keller and Kauffmann stated that all of the books and records, including the general ledger, general journal, cash receipts journal, cash disbursements journal, cancelled checks, daily sales reports, original cash paid-out receipts, and original cash register tapes were on hand and made available to them by Petitioner's accountant (152a-154a, 227a-230a, 248a), and that they were well kept and in good condition (78a). *Keller and Kauffman further testified that the books and records were*

in substantial agreement with Petitioner's income tax returns as filed (96a, 159a, 223a), *and that their investigation disclosed no discrepancies in Petitioner's books and records* (165a-166a, 168a, 231a, 246a-247a, 248a).

Keller testified that he had computed Petitioner's cash on hand for the crucial dates and determined that Petitioner had cash on hand in the amount of $17,500 as of December 31, 1947, the net worth starting point for the indictment period (108a-109a).

The cash on hand as of the opening of the indictment period was arrived at by taking the cash on hand figure of $18,634.22, listed by the Petitioner on a financial statement dated September 30, 1948, which had been submitted to a bank, and subtracting therefrom the sum of $12,300 (sometimes during the course of the Government testimony stated to be $12,500) which Petitioner allegedly stated that he had on hand at the time of the prior investigation (118a).[3] The difference, which Keller computed to be $6,134.22 (but which actually amounted to $6,334.22), was added to the sum of $12,300 and was arbitrarily apportioned to each of the years 1944, 1945, 1946 and 1947, at the rate of $1300 per year and $1134.22 for the year 1948 (125a, 184a, 195a, 259a).

[3] The examination leading to the indictment in the case involved the years 1944 through 1949, inclusive (180a). Previously the Petitioner had been examined for the years 1934 through 1941, inclusive (82a), and was indicted under Section 145 (b) for the years 1940 and 1941. Because he "didn't have any books", he pleaded guilty to this indictment on the advice of his attorney (466a-467a).

Petitioner was also examined for the years 1942 and 1943 and certain civil adjustments were made but no fraud was alleged for these years (580a-591a, 594a-599a).

Because of the obvious weaknesses in such a method, Keller sought to substantiate his opening cash on hand determination by preparing an available funds statement. In this statement he determined total cash funds available to petitioner during the period commencing January 1, 1942, and ending December 31, 1947, to be $5,362.10 as follows (119a-122a):

Income Reported Per Original Tax Returns (1942-1947)	$26,077.26
Add: Depreciation 1942-1947	4,175.56
Total Funds Available	30,252.90[4]
Less: Expenditures 1942-1947	24,890.80
Net Available Funds	$ 5,362.10

The net available funds figure of $5,362.10 was then added by Keller to the currency alleged to be on hand as of December 31, 1941, in the amount of $12,300, resulting in a cash on hand determination at December 31, 1947, of $17,662.10 or approximately $17,500 (122a).

The net available funds figure computed by Keller failed to take into account approximately $9,323.05 which the Government claimed was Petitioner's additional income for the years 1942 to 1946 inclusive.[5]

[4] Apparent mathematical error.

[5] Petitioner was charged in a prior investigation with additional income for the years 1942 and 1943 in the amount of $3,269 on which he subsequently paid additional tax (595a-602a). In the present investigation Petitioner has been charged with understatement of income for the years 1944, 1945, 1946 and 1947 totalling $6054.05 (181a, 262a).

By failing to include these understatements for the pre-indictment years, Keller's available funds computation did not conform with the Government's own evidence and did not fully state the facts as they were known to the Government.

Had this money been taken into account, it would have pointed up the arbitrary nature of Keller's cash on hand computation. This failure, in practical effect also deprived Petitioner of a source of non-taxable funds with respect to the indictment years.

Petitioner testified on his own behalf (402a). He stated that he maintained a safe deposit box at the First National Bank, Canton, Ohio, for many years (419a), and that he had approximately twenty-eight to thirty thousand dollars available in this box as of December 31, 1947, to construct his restaurant building (419a). In 1948, Petitioner opened a safe deposit box at the George D. Harter Bank in Canton and transferred his cash funds to that box so that they would be available for deposit in the checking account he maintained at that bank, as needed, to pay for the cost of the new building (419a).

Petitioner further stated that the construction bills were paid by check, and that it was his practice to take the bills to his accountant who issued the checks in payment, and that he would take out the necessary funds from his safe deposit box, and deposit the cash funds to his checking account to cover the checks (425a-426a). The transfer of funds began approximately in September of 1948 (426a). In the fall of 1949, Petitioner arranged a bank loan to cover the cost of the fixtures, and was thereby enabled to keep cash on hand as operating capital for the new venture (426a-427a).

Other substantial evidence was adduced on behalf of Petitioner. His accountant (who testified both for the prosecution and defense (10a, 295a)) stated that Petitioner's records had been kept in accordance with the system installed by him in 1942 and under his super-

vision and control (295a-297a), and that he had no reason to believe that Petitioner's sales receipts were not being properly reported (41a, 296a-297a). He further stated that he was satisfied that Petitioner had invested additional cash in the business in 1948 and 1949 and that he had made entries to that effect at the close of each year (311a, 314a).

Petitioner also offered the testimony of a Certified Public Accountant as an expert witness. This witness stated that he had audited the original data, such as cash register tapes, cash pay-out slips, bills and daily sales reports,[6] and checked this data with Petitioner's general books of account (484a-485a). His examination revealed that all of the original data with minor exceptions were available and, except for a few slight errors, were in agreement with the general books of account (484a-485a). He further testified that he had examined the checking account and that this account reflected excess deposits for each of the years 1948 and 1949 indicating that a source of funds other than restaurant receipts had been deposited into the bank account (486a, 487a).

He stated also that he had examined the safe deposit box entry records, the cash receipts journal, and the bank statements for Petitioner's checking account for the years 1948 and 1949 (488a). His examination revealed substantial deposits were made by Petitioner from September 17, 1948 to June 18, 1949, and that in each and every instance a visit to the safe deposit box coincided with an entry on the bank statement, and

[6] Petitioner sought to introduce in evidence all of this original data, but his offer was denied by the trial court because they were too bulky and because the information had been copied into the general books of account (310a).

also with an entry made in the Cash Receipts Journal (488a-489a). These deposits totaled $15,985.15 in 1948, and $12,000 in 1949,[7] *and of these amounts $7,735.15 were made while the defendant's restaurant business was completely closed down* (488a-490a).

He stated that the Government had erred in failing to include the source of funds represented by the understatements determined by the Government amounting to $3,269. for the years 1942 and 1943, and $6,054.05 for the years 1944 through 1947, inclusive (498a, 510a).

[7] An examination of the Safe Deposit Entrance Record of the Harter Bank, pertaining to Petitioner's safe deposit box (579a), and the bank statements reflecting deposits made by him to his checking account at the Harter Bank (Defendant's Exhibit U) and the Cash Receipts Journal of Petitioner (Defendant's Exhibit L) revealed that in each and every instance that a visit was made to the safe deposit box by Petitioner, a deposit for the same date was reflected on his bank statements, and a corresponding entry was made in the Cash Receipts Journal (488a-489a, 579a) as follows:

Date of Visit, Deposit and Entry	Amount of Deposit	
September 7, 1948	$ 300.00	
September 10, 1948	400.00	
September 13, 1948	535.15	
September 21, 1948	500.00	
October 11, 1948	3250.00	
November 15, 1948	7000.00	
December 11, 1948	2000.00	
December 27, 1948	2000.00	
Total for 1948		15,985.15
January 17, 1949	2000.00	
February 7, 1949	2000.00	
February 23, 1949	2000.00	
March 18, 1949	2000.00	
June 18, 1949	4000.00	
Total for 1949		12,000.00
TOTAL DEPOSITS		$27,985.15

He also made a gross profit study on the basis of Petitioner's tax returns and the Government's figures. This study indicated that the sales, with the Government's claimed understatements included, were grossly distorted for the indictment years of 1948 and 1949 (500a-501a).[8]

He further testified that using the same starting point that Special Agent Keller had used—January 1, 1942—and taking into consideration all of the known sources of funds, Petitioner could have accumulated approximately $27,185 by December 31, 1947, the starting point of the Government's net worth for the indictment years (509a-516a).

REASONS FOR GRANTING THE WRIT

I

The *Jencks Act*, 18 U.S.C. § 3500,[9] was enacted on September 2, 1957 as Public Law 85-269, in the wake of this Court's decision in *Jencks* v. *United States*, 353 U.S. 657. The statute provides, *inter alia*, that once a Government witness has completed his direct examination, the defendant on motion is entitled to an order requiring the Government to produce all written

[8] The Gross Profit Study revealed the following:

Year	Per Return	Per Government Including Understatements
1944	37.1%	38.9%
1945	38.9%	41.3%
1946	39.9%	41.0%
1947	42.4%	42.4%
1948	47.1%	58.4%
1949	40.4%	55.5%

[9] Set out in full at pp. 3-5, *supra*.

statements in its possession made by said witness relating to the subject matter as to which the witness has testified. If the contents of any such statement relate to the subject matter of the testimony of the witness, the statute further provides that the court shall order the statement to be delivered to the defendant for his examination and use. If the Government claims any statement ordered to be produced contains matter which does not relate to the subject matter of the testimony of the witness, the Act requires that the statement shall be delivered *in camera* to the court, and the court shall excise the portions of the statement which do not relate to the subject matter of the testimony of the witness. The entire text is required to be preserved by the Government for examination by the appellate court, if appeal is had.

In this case, the trial court directed the Government to produce for an *in camera* inspection the statement of its chief witness, Keller, at the conclusion of his direct examination. However, when this statement was examined by petitioner's counsel, it became apparent that the Government had removed from the statement all exhibits attached thereto and referred to therein. When Petitioner's counsel requested the court to direct the production of the removed exhibits, the court held that the request was improper and overruled it. See pp. 6-7, *supra*.

In so ruling, the trial court rendered an important construction of 18 U.S.C. § 3500. It held, in effect (and the Court of Appeals, by affirming, has therefore also held), that exhibits which were the subject matter of the testimony of a Government witness and which were attached to and referred to in the witness' statement, do not constitute a part of the statement and therefore need not be produced along with the state-

ment, even for purposes of an *in camera* inspection by the court.[10]

This construction of the *Jencks Act* is important to the general administration of criminal justice in the federal courts, and is of particular importance in the trial of criminal tax cases. It is standard procedure for the special agent in charge of a criminal tax investigation to make a report at the conclusion of his investigation.[11] It is also standard procedure to attach as exhibits to this report the results of an investigation including net worth computations, statements of third party witnesses and other important evidence developed by the investigation.[12] And most important, is the fact that the special agent in charge of an investigation in-

---

[10] The trial court's opinion is directed solely to the question of whether petitioner's original request, for one of the exhibits (Statement of Frank David—Exhibit I) should have been granted. As the transcript makes clear, Petitioner did not so limit his demand, *supra* p. 7, see also 135a-151a. Though Petitioner made specific mention in his demand for the statement given by Petitioner to Keller (135a), he also, from the outset, demanded "any other statements transmitted by Mr. Keller in connection with his testimony." 135a-138a; see also 140a-141a, 143a, 146a, 151a.

Though the trial court did not deal with the issue presented *in its opinion*, it clearly ruled on the issue *during the course of the trial*. And at the time the demand was made during the trial, the *Jencks Act* was expressly cited to the trial court and the court at the time acknowledged that it was "familiar with the statute" (136a, 137a).

The failure of the trial court to properly deal with the issue in its memorandum opinion and the failure of the court of appeals to write an opinion should not be permitted to obscure the issue, or to deprive the Petitioner of a review by this Court.

[11] Keller testified on *voir dire*: "We always submit a report at the conclusion of the investigation" (141a).

[12] See Keller's testimony at 142a-144a.

variably is called as the chief Government witness against the defendant.

If the decisions of the courts below represent a sound construction of the *Jencks Act*, then it becomes a simple matter for the Government to establish a policy which could completely frustrate the purpose of the Act and the decision of this Court which gave rise to the Act. The Government need only adopt a procedure under which an agent's reports would be brief and perfunctory with the main substance of his investigations relegated to exhibits. In this way, the critical portions of the agent's statement could be removed from the reach of a defendant.

While it has been held that failure to make available prior statements of a witness constitutes reversible error and no showing of prejudice is necessary, *Bergman* v. *United States* (C.A. 6), 253 F. 2d 933, 935-936, the critical consequences of the question here presented are best exemplified by what in fact occurred in this case.

The exhibits attached to Keller's report (as set forth in the Government's Brief in the court below) were as follows:

Exhibit No.	
A	Copy of Deputy Collector Dale Kauffman's report in re Frank David
B	Form 899, Certificate of Assessments and Payments
C	Photostatic copies of Frank David's 1944 return
D	Photostatic copies of Frank David's 1945 return

Exhibit No.

E	Photostatic copies of Frank David's 1946 return
F	Photostatic copies of Frank David's 1947 return
G	Photostatic copies of Frank David's 1948 return
H	Photostatic copies of Frank David's 1949 return
I	Sworn statement of Frank David
J	Sworn Statement of Simon A. Spilker
K	Financial statements of Frank David as of December 31, 1943, to 1949, inclusive, as prepared by his accountant Simon A. Spilker
L	Copies of net worth statements prepared by agents of the Bureau of Internal Revenue in prior examinations of the tax-payer's return
M	Sworn statement of Mrs. Mae Wise
N	Chronological list of conferences with tax-payer

Keller's testimony was all-inclusive. It encompassed the issues of cash on hand, the prior tax history of Petitioner, the statements and net worth of Petitioner, and other critical matters at issue. A substantial portion of his testimony related to information contained in the exhibits to his report (105a-106a, 126a-133a, 142a, 144a, 150a-151a).[13] He frequently testified concerning his interview with Petitioner on September 26, 1950 and transcribed in Exhibit I (e.g. 105a); and Exhibit L, containing the net worth statements in prior examinations, was the basis of his testimony in connection with cash on hand as of the opening of the indictment

period, and particularly with respect to his available funds computation (117a, 118a, 120a, 122a).

In view of the damaging and prejudicial nature of Keller's direct testimony, the impeachment of that testimony was singularly important to Petitioner. A proper defense made it imperative that Keller's report of examination be produced in its entirety—either to the trial court or the Petitioner—at the time of demand.[14]

---

[13] During the course of Keller's *voir dire*, he was asked whether the exhibits to his report bore on his direct examination, and he answered that they did not (142a). In the context in which this colloquy occurred it is doubtful that Keller meant to say that the exhibits had no bearing on his testimony; but rather that the exhibits which contained statements of witnesses had no bearing on his testimony.

Nevertheless, it is clear under the *Jencks Act*, that it is not for the witness or the Government to decide the question of materiality and relevancy; the statute places this responsibility on the trial court. In consequence, Keller's denial (if it was so intended) has no bearing on the issue presented.

[14] None of the exhibits were produced for Petitioner's examination when the Keller report was turned over at the conclusion of Keller's direct examination. Later in the trial, some of the exhibits were either produced or introduced in evidence: Exhibits A and M were produced for inspection after Keller left the stand (252a, 288a). Exhibits B through K, inclusive, were introduced in evidence, some after Keller had left the stand; Exhibits L and N were *never produced or introduced and have to this day never been seen by either the trial court or the petitioner* and, were not submitted to the court of appeals.

That *some* of these exhibits were *later*, produced or introduced does not vitiate the prejudice stemming from the trial court's failure to order them produced at the conclusion of Keller's direct testimony. Petitioner had sought their production for purposes of cross examining Keller; but by the time they had become available, Keller had left the stand.

18 U.S.C. § 3500 indicates a congressional purpose that a complete report be submitted to the trial court. It specifically requires, even where the trial court excises portions of a statement, that "the *entire* text of such statement shall be preserved" for use by the appellate court. "Entire" means "complete", "total", "whole"; it does not authorize the removal of exhibits.

The issue raised in this case is different from but related to the issues in cases now pending before this Court on certiorari. *Lev* v. *United States*, No. 435; *Wool* v. *United States*, No. 436; *Rubin* v. *United States*, No. 437; *Rosenberg* v. *United States*, No. 451; *Palermo* v. *United States*, No. 471; *Pittsburgh Plate Glass Co.* v. *United States*, No. 489; *Galax Mirror Co., Inc.* v. *United States*, No. 491 (all O.T. 1958).

That this Court is presently concerned with the meaning and thrust of the *Jencks Act* and the consequences of its decision in *Jencks* v. *United States, supra*, is obvious. The question presented here holds at least as much importance as the questions presented in the cases in which certiorari has already been granted.

II

In the event that it is determined that the *Jencks Act*, 18 U.S.C. § 3500, does not require that exhibits attached to the statement of a Government witness be produced along with the statement, a serious question of constitutional due process emerges: Whether the *Jencks Act*, as so construed, denies to Petitioner the due process of law guaranteed by the Fifth Amendment, as determined by this Court in *Jencks* v. *United States*, 353 U.S. 657?

The trial court denied Petitioner's request to examine the exhibits attached to the Keller report. Yet, as we have indicated, pp. 18-19, *supra*, a substantial portion of Keller's testimony related to the information contained in these exhibits. In consequence, the effect of the decisions of the courts below was to deny access to a substantial portion of Keller's report for use in Petitioner's defense.

This is precisely what this Court appears to have held to be a denial of due process in the *Jencks* case:

> "We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. *Justice requires no less*". 353 U.S. at 668-669 (emphasis added).

Thus, to the extent that the withholding of the exhibits may be justified under 18 U.S.C. § 3500, that Act may contravene the due process clause of the Fifth Amendment.

In the court below,[13] the Government contended that the *Jencks* decision did not set a constitutional standard, and that the statute should therefore not be tested

[redacted]

[13] This question was not raised in the trial court, but was raised in the court below. This Court has authority to consider the question as a "plain error" and a "defect" "affecting substantial rights" pursuant to Rule 52(b), Federal Rules of Criminal Procedure; cf. Rule 40, 1.(d)(2), Revised Rules of the Supreme Court; *Wiborg* v. *United States*, 163 U.S. 632, 658.

against it. The Government's claim was that the *Jencks* decision rested upon this Court's supervisory authority over the administration of criminal justice in the Federal courts rather than upon constitutional foundations, and there is support for this view in a number of circuit court opinions. E.g. *Scales* v. *United States* (C.A. 4), 260 F. 2d 21, 44, *and cases cited; see* also *United States* v. *Grunewald* (S.D.N.Y.), 162 F. Supp. 621, 625. This problem is now before the Court in cases in which certiorari has been granted. E. g. *Rosenberg* v. *United States*, No. 451; *Palermo* v. *United States*, No. 471; *Scales* v. *United States*, No. 488.

III

A. In its prior investigation of Petitioner's income taxes, the Government assessed Petitioner with additional income of $3,269.00 for the years 1942 and 1943 (510a, 595a-602a). In addition, both Keller and Kauffmann testified that Petitioner had understated his income for the years 1944, 1945, 1946 and 1947 in the amount of $6,054.05 (181a, 262a, 510a). However, none of these understatements (i.e., those *assessed* for 1942 and 1943, or those *determined* for 1944 through 1947) were credited to Petitioner in Keller's additional available funds figure (119a-120a, 122a, 188a).

These understatements, totalling $9,323.05, represented additional sources of funds available to the Petitioner as of the opening of the indictment period *as determined by the Government*. Yet these funds were ignored in the computation relied upon by the Government to establish Petitioner's available funds as of that crucial date. Apart from the consideration of any of the other errors in the cash on hand figure claimed

by Petitioner in the courts below,[16] and based upon the Government's own figures, the Government's opening cash at December 31, 1947, was, therefore, deficient by $9,323.05. If this figure had been added to the Government's original computation of $17,500.00 in cash available as of December 31, 1947, Petitioner would have been credited with at least $26,823.05—which would have substantially supported Petitioner's claim that he had cash on hand on that date of approximately $28,000.00.

The failure of the courts below to require that these understatements be considered in establishing petitioner's opening net worth for the indictment period[17] is in implicit conflict with the decision of the Second

---

[16] In the courts below, Petitioner also claimed that he should have been credited with the "Doud Money" in the amount of $10,500, representing funds available for the purchase of the restaurant property in 1942; and the "Wise Money", $2,000 of which was recovered in the pre-indictment years and the balance of $10,000 in November of 1948. However, these matters are not in issue here.

[17] Neither of the courts below reached this question because of an apparent misunderstanding with respect to the facts:

The trial court, in its memorandum opinion, held that "Defendant complains that the Government computations did not reflect any credit for his understatements during the pre-indictment years. The testimony of Mr. Keller is to the contrary as he testified that the difference in cash amounting to over $6,000 was pro-rated as additional income over those years. Defendant had paid taxes of $3,269 additional income, and the Government also took into account his living expenses during those years * * *." (App. 8, *infra*)

This conclusion of the trial court is clearly in error, since Keller's available funds computation was based solely on income reported per original tax returns (p. 11, *supra;* 119a-120a, 122a, 188a).

By affirming the decision of the District Court "upon the grounds and for the reasons stated in the memorandum opinion" (App. 1, *infra*), the Court of Appeals fell into the same error.

Circuit in *United States* v. *Altruda*, 224 F. 2d 935, where such failure was held to constitute reversible error. In that case, the Government claimed that the defendant had understated his income from certain realty holdings. The Government did not, however, credit him with these understatements on an exhibit which purported to reflect his net worth increases on arriving at his cash on hand as of the opening of the indictment period. The Court ruled that "the omission of these items, of which the Government had notice prior to trial, from Ex. 67 * * * served to make that exhibit incomplete, inaccurate and misleading and the failure of the trial judge to sustain objection to its admission in evidence operated to the prejudice of the defendant." 224 F. 2d at 942.[18]

This Court's decision in *Holland* v. *United States*, 348 U.S. 121, did not expressly deal with the problem which arises from understatements in pre-indictment years. In that case, this Court gave as examples of nontaxable sources of alleged net worth increases, "prior earnings, stock transactions, real estate profits, inheritances, gifts, etc." 348 U.S. at 127; and "gifts, loans, inheritances, etc." 348 U.S. at 137. And while understatements from pre-indictment years would seem to be encompassed by the term "prior earnings", they would certainly, as a matter of logic, fall within the general category of nontaxable sources set out in

---

[18] In *United States* v. *Altruda*, *supra*, the Government unsuccessfully contended that the defendant had understated his living expenses and that those understatements should offset the cash credit resulting to him from the understatements in income. 224 F. 2d at 942.

In the instant case, all of Petitioner's living expenses and nondeductible expenditures were testified to and accounted for during the entire period January 1, 1942 to December 31, 1947. (120a-122a, App. 8).

Holland. It would be manifestly unconscionable to permit the Government to rely on this evidence to prove an element of the prosecution case and deny to a defendant the right to rely on the same evidence in establishing his defense. Cf. *United States* v. *Reynolds*, 345 U.S. 1, 12.

The determination of the question of whether a criminal tax defendant should be given credit for the understatements charged against him by the Government for pre-indictment years, and its consequential effect on the question of likely source, is of manifest importance in the administration of the Internal Revenue Laws and the prosecution of criminal tax cases. The Government, invariably, in net worth cases, introduces such evidence for the purpose of proving scheme, motive and design on the part of the criminal tax defendant in order to establish the indispensable statutory requirements of intent and wilfullness.[19] See, e.g., *Mitchell* v. *United States* (C.A. 9), 213 F. 2d 951, 958, cert. den. 348 U.S. 912; *Himmelfarb* v. *United States* (C.A. 9), 175 F. 2d 924, 941, cert. den. 338 U.S. 860; *Malone* v. *United States* (C.A. 7), 94 F. 2d 281, 286-287, cert. den. 304 U.S. 562; *Tinkoff* v.

[19] At the trial, when the Government offered testimony relating to the investigation of Petitioner's tax returns for the years 1934-1941, and the defense objected, the court overruled the objection and instructed the jury: "You will not consider this evidence as any proof concerning his guilt. But the evidence will be received merely for the purpose of showing a tax history and as bearing on the question of its [sic] intent in this matter" (80a-81a).

In its memorandum opinion (App. 7, *infra*), the trial court also observed: "The jury * * * could, in determining his credibility, take into account his previous plea of guilty in this Court, to the charge of income tax evasion for the years 1941 and 1942, and the fact that each year thereafter he understated his income * * *."

United States (C.A. 7), 86 F. 2d 868, 879, cert. den. 301 U.S. 689. Whether these understatements may also be used by a criminal tax defendant as a source of funds, and as bearing on the issue of likely source, is the necessary other side of the coin, and is a problem which has not been, but should be, determined by this Court.

B. The Government's failure, in this case, either to include the source of funds represented by pre-indictment year understatements, or negative them, presents a further issue in the light of this Court's decisions in *Holland* v. *United States*, *supra*, and *United States* v. *Massei*, 355 U.S. 595.

Generally, likely source has been proved in two ways. When the taxpayer was the owner of an undisclosed business, proof that the undisclosed business was capable of producing income was sufficient. *United States* v. *Johnson*, 319 U.S. 503. Likewise, where the ownership of a business is disclosed, likely source is sufficiently established when the Government proves that the disclosed business was capable of producing much more income than was reported, and in amounts sufficient to account for the claimed understatements. *Holland* v. *United States*, *supra*.

No claim is made that the Petitioner was engaged in or owned any undisclosed business, or had any other source of unreported income (176a-177a, 179a, 189a, 246a-247a). The crucial question, therefore, was whether the Petitioner's disclosed business—the res-

taurant—was capable of producing the net worth increases attributed to it for the indictment years.[20]

The showing made in the instant case was clearly to the contrary. Uncontroverted evidence indicated that after Petitioner's building had been condemned by the City of Canton (339a, 406a), he had closed his restaurant for several weeks in 1948, and moved to a temporary location, in order to raise and rebuild the original location (339a, 409a-410a). While operating in the temporary location, business was below normal (357a, 410a). In addition, Petitioner was completely out of business for over four months during 1949, and his chief source of income was therefore eliminated during that period (231a, 410a). These disrupted years mani-

[20]

BUSINESS INCOME

	(1) Restaurant Income	(2) Parking Lot Rental*	(3) Total Per Return	(4) Purported Understatements	(5) Total Per Government
1944	$ 813.68	$	$ 813.68	$ 1,966.05	$ 2,779.73
1945	2,553.51		2,553.51	2,764.14	5,317.65
1946	5,156.46		5,156.46	1,323.86	6,480.32
1947	677.31	1,285.70	1,963.01	—0—	1,963.01
	9,200.96	1,285.70	10,486.66	6,054.05	16,540.71
1948	1,774.72	1,637.36	3,412.08	13,065.28	16,477.36
1949	(4,271.20)	1,883.23	(2,387.97)	12,965.03	10,577.06
	$ (2,496.48)	$3,520.59	$ 1,024.11	$26,030.31	$27,054.42
	$ 6,704.48	$4,806.29	$11,510.77	$32,084.36	$43,595.13

Data in Columns 1, 2, and 3 obtained from Government Exhibits 2 to 7, inclusive, the copies of the original tax returns filed. For data in Column 4, see (181a, 262a, 554a-555a). Column 5 represents addition of Columns 3 and 4.

* Prior to 1947, the defendant operated a parking lot, and the receipts therefrom were included as part of the restaurant business. In 1947, the parking lot was leased to a third party, on a fixed monthly rental basis. The rental income was listed separately in Schedule B of the defendant's tax returns. The figure shown above is the net income after expenses.

festly could not have produced the income necessary to support the Government's claims. Note, in this regard, Gross Profit Study, *supra*, p. 15, fn. 8.

In addition, Special Agent Keller, who conducted the investigation and was the chief prosecution witness, made the devastating admission that *he did not know until the trial was in progress that Petitioner's restaurant had been closed for periods during the indictment years and that no income had been derived from it during part of 1948 and 1949* (169a, 173a). This admission clearly casts doubts on whether the Government could, or did, carry the burden as to likely source placed upon it under *Holland* and *Massei*.

Finally, and even more significant, was the fact that during the same period, substantial deposits were made to Petitioner's checking account, and shown on the books, which *deposits correlated exactly with the date of his entries to his safe deposit box* at the George D. Harter Bank in Canton (*supra*, p. 14, fn. 7). From September 7, 1948, the approximate date on which construction of the new building was commenced, to July 1, 1949, the approximate date of completion, the total excess deposits amounted to $27,985.15, of which amount $15,985.15 was deposited between September 7, 1948, and December 27, 1948, and $12,000 deposited between January 17, 1949, and June 18, 1949. *$7,735.15 of the total was deposited during the periods when the restaurant was completely closed down* (488a-490a, 579a). The total of these deposits approximately equalled the total of the alleged understatements ($13,065.28 for 1948 and $12,965.03 for 1949) (554a-555a). These deposits indicate that Petitioner's business could not and was not producing undisclosed income during the years involved for, if it had, there

would have been no need to add outside funds during the same period.

Thus, the requisite showing that Petitioner's business accounted for the increases in net worth during the indictment period has not been made in this case. Proof of the likely source required by *Holland* was entirely lacking. The negativing of all possible sources of nontaxable income required by *Massei* was equally lacking. At best, this conviction rests on "increases in net worth, standing alone", which, this Court has admonished, "cannot be assumed to be attributable to currently taxable income". *Holland* v. *United States*, 348 U.S. at 137-138; *cf. Thomas* v. *Commissioner* (C.A. 1), 232 F. 2d 520, 526.

First in *Holland* and then in *Massei*, this Court has set out the requirements with respect to the problem of likely source as it arises in net worth prosecutions. But the principles which these decisions establish can have force and effect only to the extent that they are carefully and consistently applied. If they may be improperly applied, if they may be sometimes disregarded, the practical protection this Court so painstakingly fashioned loses its high function. Moreover, since there are dangerous pitfalls inherent in the net worth method, a failure to carefully control its use in accordance with the principles laid down by this Court may result in serious injustice to the innocent.

We believe that this case presents a striking instance in which one of these principles has been violated or ignored, with the result that Petitioner has been "ensnared" in the very dangers and pitfalls which it was this Court's announced intention to protect against.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES C. HERNDON,
SAM D. BARTLO
430 Second National Bldg.,
Akron, Ohio,

ALAN Y. COLE,
815 Fifteenth Street, N. W.
Washington 5, D. C.,
Attorneys for Petitioner.

March 4, 1959

APPENDIX A

No. 13,605

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK DAVID, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

Order

(Filed February 2, 1959)

Before ALLEN, Chief Judge, SIMONS, Circuit Judge, and KENT, District Judge.

The judgment of the District Court is hereby affirmed upon the grounds and for the reasons stated in the memorandum opinion of the United States District Court upon motion for acquittal or, in the alternative, for new trial. —— Fed. Supp. ——.

Approved for entry:

/s/ FLORENCE E. ALLEN
Chief Judge
United States Court of Appeals

APPENDIX B

Memorandum Re: Motion of Defendant for Judgment of Acquittal and, in the Alternative, for a New Trial (Filed February 7, 1958)

WEICK, J.:

The defendant stands convicted on two counts of an indictment charging him with wilful evasion of income taxes for the years 1948 and 1949.

He has filed his motion for judgment of acquittal, or in the alternative, for a new trial.

Complaint is first made that during the trial the Court permitted the Government attorney to distribute to the jury photostatic copies of stipulated net worth computations for the years 1947, 1948 and 1949, the original of which, except as to items of cash in dispute, had already been received in evidence as Joint Exhibit "1A." The purpose was to permit the jury to intelligently follow the testimony of the witness Keller as to his computations without being confused over a lot of figures.

No objection to this procedure was made at the time by defendant's counsel. After the photostats had been handed the jury defendant's counsel then objected and the Court instructed the jury that they were merely photostats of an exhibit already received in evidence by stipulation of the parties, except as to said cash items which represented what the Government contended. The Court further instructed the jury that the photostats were for explanatory and illustrative purposes.

The jury could not see the figures on the admitted Exhibit "1A." It is not understandable how defendant could be prejudiced by permitting the jury to follow the witnesses' testimony by permitting them to use a photostatic copy of the exhibit which the parties had jointly offered in evidence, particularly since the Court explained the purpose and that the cash items represented only what the Government contended he had on hand. *Holland vs. United States*, 348 U.S. 121. During the course of Mr. Keller's testimony the figures were explained in detail and the exhibit was later received in evidence as Gov't. Ex. 17 for explanatory and illustrative purposes.

It is next contended that the Court erred in refusing to order the Government to produce a transcribed unsigned statement of the defendant, Frank David, when the witness Keller was on the stand.

Jencks vs. United States, 353 U.S. 657 (1957) and Title 18 U.S.C.A. § 3500 are cited as authority.

The statute (Title 18 U.S.C.A. § 3500) was in force at the time of trial and, therefore, governs. *Lohman, Jr. vs. United States*, No. 13189 (CA 6, 1958).

Under this statute, the Government would be required to produce the statement of the witness Keller at the end of his direct examination. Defendant was granted permission to interrogate the witness Keller and he established that the witness had made a written report of his investigation of the case which report the Government produced and handed to defense counsel for their examination and inspection. Defendant did not offer this report in evidence.

Defendant claims that, under this statute, the Court should, in addition, have ordered production of the transcribed unsigned statement of the defendant David taken on September 25, 1950.

The statute will bear no such interpretation as it requires only the production of the statement of a witness of the Government who has completed his direct examination. It does not require production of the statement of any other person.

The Court would have no right to extend the operation of the statute beyond what its plain language requires.

In any event, the point is without merit because the statement was later given to defendant's attorney during the cross-examination of defendant and it was received in evidence as Gov't. Exhibit 21.

On page 28 of defendant's brief is contained the following:

> "The statement was admitted as Gov't. Exhibit 21 over the objection of defendant's counsel."

The record does not support this claim, but on the contrary shows that defense counsel consented to the admission of the exhibit in evidence.

In his reply brief, defendant further charges as error the admission in evidence, over his objection, of the statement of the witness Spilker. The record does not support this claim, but shows that the statement originally was received in evidence as a Joint Exhibit "1-e," without objection, and the numbering was later changed to Gov't. Exhibit "1-e."

When it was offered by the Government attorney, he addressed defense counsel, "if you have no objection."

Defense counsel made no objection. Later when the exhibit was remarked Gov't. Exhibit "1-e" defense counsel stated: "other than that, we don't object to it." This referred to some pencil marks on the exhibit which were removed.

It is further contended that the Court erred in not admitting testimony of the witnesses Spilker and Correll concerning their conversations with the defendant.

These conversations were hearsay evidence and, therefore, inadmissible, but notwithstanding this fact the record will show that most of the conversations related to defendant's alleged recovery of about $12,300 from Mae Wise and were in fact admitted in evidence without objection.

Furthermore, defendant took the witness stand and gave direct testimony on this subject.

We now come to the consideration of defendant's motion for judgment of acquittal.

The rule applicable in this case was laid down by the Court of Appeals in *Ross vs. United States*, 197 F. 2d 660 (CA 6, 1952) and requires the Court to consider the evidence in the most favorable light to the Government. There must, however, be substantial evidence to support the verdict of the jury.

The Government's case was based solely on the "net worth" method of computation to prove the claimed understatements for the years 1948 and 1949.

The parties agreed to all the items on the defendant's net worth statements for the years 1943 to 1949, inclusive, except cash on hand and living expenses for the years 1943 to 1947, inclusive.

There were substantial increases in defendant's net worth during the indictment years not reflected in the income shown on his income tax returns.

The question for determination by the jury was whether these increases in net worth resulted from taxable income received by the defendant during the years in question as claimed by the Government or from use of cash on hand which he had accumulated prior thereto.

As is usual in cases involving net worth computations, defendant claimed he had a large amount of cash on hand which the Government did not take into account.

It was the contention of the Government that defendant had cash on hand as of December 31, 1947 in the amount of $17,500, $18,634.72 on December 31, 1948 and $15,957 on December 31, 1949.

Defendant, on the other hand, claimed that he had cash on hand of $28,000 to $30,000 on December 31, 1947.

After the tax investigation started in this case, defendant's attorney Chas. K. Correll on December 21, 1950 sent to the Government, seven financial statements of defendant, as of December 31st for the years 1943 to 1949, inclusive. Each of the statements showed cash in safe deposit box of $12,500. These statements had been prepared by defendant's auditor Spilker.

The Government in its net worth computations as of December 31, 1947, gave defendant credit for $5,000 more cash than was shown in his statement as of the same date which he had furnished to the Government. This inured to his benefit, as without this credit, his increase in net worth for 1948 would have been much larger.

In his statement, which was given to Agents Keller and Kaufman on September 25, 1950, defendant stated that the largest amount of cash which he had on hand since 1942 was $16,000 to $18,000 in 1949. Agents Keller and Kaufman actually counted the money in defendant's safe deposit box on August 11, 1950 in the amount of $15,957.00.

Furthermore, in November 1948 defendant furnished George D. Harter National Bank of Canton a financial statement, for use in connection with a loan, which showed cash on hand of $18,634.22.

The Government used the figure of $18,634.22 shown as cash on hand in the Harter Bank statement of November 1948 to establish the beginning cash on hand December 31, 1948, which was very close in point of time. Also the actual cash in the amount of $15,957.00 counted on August 11, 1950 was used by the Government to establish the amount of the cash on hand on December 31, 1949.

Defendant's auditor Lawrence testified that the only accurate way to establish cash on hand on a given date is to count it.

If this were required under the law, there never could be a conviction for income tax evasion where the net worth method of calculation is used, because only the defendant is in a position to count the money and the jury would have to believe whatever he said.

In my judgment, there was substantial evidence to justify the verdict of the jury with respect to Count Number two of the indictment.

In order to establish the beginning cash figure of $17,500 as of December 31, 1947, involved in the first count of the indictment, the Government subtracted from the cash of $18,634.22 shown on the Harter Bank statement of November 1948 the amount of $1,500 cash on hand shown on the statements defendant furnished to the Government for the

years 1943 to 1947, inclusive, and obtained the figure of $6,134 which it distributed prorata as additional income to defendant over those years.

It also calculated that from defendant's reported income over those years he had a possible cash accumulation of $5,362. It added this amount of $5,362 to the amount of $12,300 which defendant, in his written statement made on June 25, 1942, admitted he had on hand, to obtain the approximate beginning figure of $17,500 for December 31, 1947.

The jury was carefully instructed as to the law applicable to the case in accordance with the cases of *Holland*, *Friedberg*, *Smith* and *Calderon* reported in 348 U.S. at pages 121, 142, 147 and 160 respectively. No claim is made here that the charge was erroneous in any respect.

The jury was not compelled to believe the testimony of the defendant that he had $28,000 to $30,000 cash on hand on December 31, 1947, but could, in determining his credibility, take into account his previous plea of guilty, in this Court, to the charge of income tax evasion for the years 1941 and 1942, and the fact that each year thereafter he understated his income except the year 1947.

The jury also had a right to consider, in determining his guilt or innocence, his admission that he had $12,500 in cash in 1942; the seven financial statements which he furnished the Government for the years 1943 to 1949, inclusive, each showing cash on hand in the amount of $12,500; his admission in 1950 that the largest amount of cash he had on hand since the year 1942 was $16,000 to $18,000 in 1949; the actual count of the cash on August 11, 1950 in the amount of $15,957; his financial statement to George D. Harter Bank in November 1948 showing $18,634.22 on hand; the testimony of Mae Wise that defendant did not report all of his sales; that he threw away a portion of the cash register tape on which his daily sales were recorded and told her to mind her own business, when she remonstrated; the stip-

ulation of assets and liabilities which included all items except cash on hand on the critical dates and living expenses for some of the years.

Under all the evidence in this case the jury could find that the beginning cash of $17,500 for the year 1948 was reasonably accurate.

Defendant complains that the Government computations did not reflect any credit for his understatements during the pre-indictment years. The testimony of Mr. Keller is to the contrary as he testified that the difference in cash amounting to over $6,000 was prorated as additional income over those years. Defendant had paid taxes on $3,269 additional income, and the Government also took into account his living expenses during those years.

Nor was the jury bound to believe defendant's story about the alleged theft of $12,300 of his money by Mrs. Mae Wise. He sued Mrs. Wise to recover this money and lost the case. He claims that later, at different times, he found the money in Mrs. Wise's home, but did not tell her about it. During part of this time he was either rooming or visiting at the Wise home and had a garden there and Mrs. Wise worked on occasions at his restaurant.

When Mrs. Wise testified against him in this trial he did not ask her a single question about the alleged theft of his money or its recovery.

The verdict of the jury is supported by substantial evidence.

The motion for judgment of acquittal or in the alternative for a new trial is overruled.

Sentence is deferred until February 14, 1958 at 10:00 A.M.

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 3 1959
JAMES R. BROWNING, Clerk

No. 750

In the Supreme Court of the United States

OCTOBER TERM, 1958

FRANK DAVID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	12

CITATIONS

Cases:

Holland v. *United States*, 348 U. S. 121	10
Jencks v. *United States*, 353 U. S. 657	6, 10
Smith v. *United States*, 348 U. S. 147	11
United States v. *Massei*, 355 U. S. 595	10

Statute:

18 U.S.C. 3500	2-3, 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 750

FRANK DAVID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. 1) is not yet reported. The opinion of the District Court (Pet. App. 1-8) is reported at 158 F. Supp. 269.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1959 (Pet. App. 1) and the petition for a writ of certiorari was filed on March 4, 1959. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Jencks Act, the Government was required, after offering testimony of a Treasury agent, to disclose not only the agent's own report, but also various exhibits to the report which were not statements of the agent and which, in any event, were in large part made available to the defendant at appropriate times throughout the trial.

2. Whether the Government's proof satisfied the "starting point" and "likely source" requirements laid down by this Court in the net worth cases.

STATUTE INVOLVED

18 U. S. C. 3500 (Act of September 2, 1957, 71 Stat. 595) provides:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire con-

tents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

On March 1, 1955, petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts of wilful attempted evasion of income taxes for the years 1948 and 1949, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of net income and the tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 5a-6a):

Year	Net Income		Tax Liability	
	Reported	Corrected	Reported	Corrected
1948	$1,116 09	$17,799 08	$67 00	$5,083 60
1949 (Loss)	(317 78)	9,816 64	0	2,068 82
Totals	$ 798 31	$27,615 72	$67 00	$7,152 42

After a jury trial the petitioner was found guilty as charged. (R. 1a-2a, 6a.) On February 14, 1958, he was fined $2,500 and sentenced to one year in prison on each of the two counts, the sentences to run concurrently. (R. 612a.)

The evidence to support the verdict may be summarized as follows:

In 1933, the petitioner went into the restaurant business in Canton, Ohio, and was still engaged in that enterprise during the years in issue. (R. 404a-411a.) The petitioner's accountant maintained a set of books for him, recording the information furnished by the petitioner. (R. 11a, 317a-318a.) Each day the petitioner would take a reading from his cash register tape and record a figure on a daily sales sheet. These sheets, together with the tapes, would then be turned over periodically to the accountant for recording. (R. 219a, 246a, 296a, 417a, 562a-563a.) The books and records were in substantial agreement with the income tax returns filed by the petitioner. (R. 96a, 223a, 246a.)

A former employee of the petitioner testified that the petitioner had not reported all of his income to his accountant; that on various occasions in 1949 she had seen him tear off portions of his current cash register tapes and throw them in the waste basket to be burned; and that on one occasion, when she told the petitioner that she knew he was not reporting all of his sales, he told her to mind her own business. (R. 281a-282a, 289a-290a.)

The Government established the amounts of the unreported income by the net worth-expenditures method. There was introduced into evidence as Joint Exhibit 1 a stipulation between the parties consisting of a net

worth-expenditures statement for the years 1943 through 1949. Every item of the petitioner's net worth, except undeposited cash on hand, was therein agreed to, as were all expenditures except living expenses. (R. 7a-8a, 533a-537a.) Although the petitioner's reported income for the prosecution years (1948 and 1949) totalled only $798.31, his visible net worth increased by $28,873.51 during that period. (Govt. Exs. 6, 7; R. 534a-535a.)

The petitioner had never received any gifts or inheritances, and admitted before and at the trial that his only sources of income and net worth increases during the prosecution years were from his restaurant, rentals, and interest on a small savings account. (R. 218a, 414a-415a, 462a, 557a, 563a-567a.) The petitioner's undeposited cash on hand at the starting point, the only asset item not agreed upon in the stipulation, was arrived at in the following manner: The petitioner admitted to the Treasury agents in 1950 that the largest amount of cash he had ever had on hand was between $16,000 and $18,000; that in 1942 he had about $12,300; and that between 1942 and 1949 he increased it to perhaps $16,000 or $18,000. (R. 447a-448a, 559a.) This was consistent with his admission to a Treasury agent in the course of an earlier examination (in 1942) that he had $12,300 of cash at that time, which figure was accepted by the agent as correct. (R. 84a, 86a-87a, 117a-118a.) Although the petitioner's records reflected no cash on hand, his attorney submitted to the Internal Revenue Service in 1950 a net worth statement prepared by the petitioner's accountant (from information furnished by petitioner) which reflected cash on hand of $12,300 at the end of *each* year from 1943

through 1949. (R. 26a-29a, 107a, 118a, 328a-329a, 545a.) A net worth statement filed by the petitioner with a bank showed that as of September 30, 1948, his cash on hand totalled $18,634.22. (R. 118a.) Analysis of petitioner's known receipts and disbursements disclosed that between 1942 and the end of 1947 he could have accumulated approximately $5,200 of cash in addition to the $12,300 he admitted having had at the end of 1942. Accordingly, his undeposited cash as of December 31, 1947, the beginning of the prosecution years, was estimated at $17,500. (R. 118a-122a.)[1]

ARGUMENT

1. The petitioner contends (Pet. 15-23) that, when Special Agent Keller had completed his direct testimony as a Government witness, the petitioner was entitled, for cross-examination purposes, not only to Keller's investigation report, but to all of the documentary evidence which accompanied that report when it was transmitted to the Department of Justice for prosecution. The contention is without merit. The petitioner relies upon the Jencks Act (18 U.S.C. 3500) and *Jencks* v. *United States*, 353 U.S. 657.

18 U.S.C. 3500, *supra*, pp. 2-3, provides that at the conclusion of the direct examination of a Government witness the court shall, on motion of the defendant, order the production of any relevant "statement (as

[1] In August, 1950, petitioner told the Treasury agents that he then had only $200 of cash on hand, which was used in his business. He claimed that he had only one safe deposit box, but the agents learned of the existence of another one and, after securing petitioner's permission to inventory its contents, counted $15,957 in currency there in September, 1950. (R. 98a-100a.) Petitioner explained that he had forgotten about the box containing the currency. (R. 220a.)

hereinafter defined) of the witness in the possession of the United States * * *." In compliance with the statute, the court in this case did order the production of Agent Keller's investigative report, which was turned over (with minor excisions, of which the petitioner makes no point) to defense counsel for use in cross-examining Keller. (R. 147a-150a.) The petitioner's complaint is that the Government should also have been required to produce the exhibits attached to Keller's report. An examination of these exhibits demonstrates that not a single one of them was a statement of the witness.[2] Instead they consisted of reports, tax returns, or statements by others, including the petitioner, referred to by the agent in his report. Plainly these documents do not constitute "statement[s] * * * of the witness," as defined in Subsection (e) of the statute; *supra*, p. 3.

Moreover, nine of the fourteen exhibits in question had previously been introduced into evidence at the trial; and three of the remaining five, consisting of reports or statements of other witnesses, were produced when such other witnesses subsequently testified. Ex-

[2] Exhibit No. A. Copy of Deputy Collector Dale Kauffman's report in re Frank David; No. B. Form 899, Certificate of Assessments and Payments; No. C. Photostatic copies of Frank David's 1944 return; No. D. Photostatic copies of Frank David's 1945 return; No. E. Photostatic copies of Frank David's 1946 return; No. F. Photostatic copies of Frank David's 1947 return; No. G. Photostatic copies of Frank David's 1948 return; No. H. Photostatic copies of Frank David's 1949 return; No. I. Sworn statement of Frank David; No. J. Sworn Statement of Simon A. Spilker; No. K. Financial statements of Frank David as of December 31, 1943, to 1949, inclusive, as prepared by his accountant Simon A. Spilker; No. L. Copies of net worth statements prepared by agents of the Bureau of Internal Revenue in prior examinations of the taxpayer's return; No. M. Sworn statement of Mrs. Mae Wise; No. N. Chronological list of conferences with taxpayer.

hibit No. A, a copy of the report of Deputy Collector Kauffmann, was produced at the proper time, *viz.*, at the conclusion of Kauffmann's direct testimony. (R. 252a.) Exhibit No. B, a certificate of the petitioner's income tax assessments and payments, had already been introduced as Government Exhibit 8. Exhibits C through H, copies of tax returns filed by petitioner, had already been introduced as Government Exhibits 2 through 7. Exhibit I, a sworn statement of the petitioner, was later introduced into evidence as Government Exhibit 21. (R. 519a-521a.) Exhibit J, a statement made by the petitioner's accountant, had already been produced at the proper time, *viz.*, at the conclusion of that witness' direct testimony, and had been received in evidence without objection. (R. 59a, 65a-66a, 538a-544a.) Exhibit K, financial statements of petitioner, prepared by his accountant and submitted to the Internal Revenue Service by the petitioner's attorney, had already been introduced as Government Exhibit 10. (R. 26a.) Exhibit M, a statement made to the Treasury agents by a former employee of the petitioner, was produced at the proper time—at the conclusion of the direct examination of that witness. (R. 288a.) There remain for discussion only Exhibits L and N.

Exhibit L is described as "Copies of net worth statements prepared by agents of the Bureau of Internal Revenue in prior examinations of the tax-payer's return". (Pet. 19.) This refers to statements of the petitioner's net worth as of the end of each year from 1933 through 1941, prepared by Revenue Agent McCammon in 1942 (R. 80a), and to such statements as of

the end of the years 1941 through 1943, prepared by another agent in 1945 in the course of an investigation of petitioner's 1943 return (R. 591a). The petitioner's counsel was already in possession of the latter report (R. 580a-591a) and if he desired Agent McCammon's report for the still earlier examination he did not say so. McCammon had already testified at some length about his examination for those years (R. 80a-87a) and defense counsel, instead of asking for a copy of his report or questioning him about the examination, confined his cross-examination to a group of questions relating merely to the amount of the personal exemption provided by the Internal Revenue Code for certain years in the 1930's (R. 88a-92a).

As for Exhibit N, that is described (Pet. 19) as a "Chronological list of conferences with taxpayer". That list was not produced at the trial or ever requested by the defense,[3] nor does the petitioner even now make any effort to explain how it could conceivably have aided him in impeaching Keller or accomplishing any other purpose.

It is clear that of the fourteen exhibits in question, twelve were either introduced into evidence or produced for inspection by the defense; that the defense already had a part of Exhibit L (net worth statements of the petitioner for 1941 through 1943) and could easily have obtained the rest of it upon proper request; and

[3] It should be noted that at the trial defense counsel placed primary emphasis upon obtaining a copy of petitioner's own statement. (Govt. Ex. 21; R. 135a-146a.) This was presented to petitioner while he was on the witness stand. He was permitted to read it in its entirety, and then denied that he recognized the statement at all. He did recall, however, having conferred with the agents at about that time. (R. 479a.)

that the defense never asked for Exhibit N, the "Chronological list of conferences with taxpayer." Whatever may be said of the petitioner's abstract legal argument (that when a Treasury agent testifies as to the results of his investigation the Government must, on defendant's request, produce all the documentary proof which accompanied his report) no such question is presented on this record. What we have said heretofore applies equally to petitioner's reliance upon *Jencks* v. *United States*, 353 U.S. 657 (which relates only to statements or reports made by a Government witness).

2. Equally without merit is the argument (Pet. 23-30) that the proof failed to satisfy the requirements relating to (1) "likely source" of taxable income and (2) net worth starting point, as laid down by this Court in *Holland* v. *United States*, 348 U.S. 121, and *United States* v. *Massei*, 355 U.S. 595.

(1) There was no source problem in this case. The petitioner admitted at the trial, as he had to the agents during the investigation, that he had received no gifts or inheritances and that all of his net worth increases arose from income from his restaurant business, rental income, and interest on a small savings account. (*Supra*, p. 5.)

(2) The proof that the petitioner's starting point net worth, as reconstructed by the Government, included all his assets as of December 31, 1947, was ample. There was evidence that between 1923 and 1933 the petitioner was a factory worker (R. 403a); that between 1934 and 1936 he filed no income tax returns; that between 1937 and 1943 he reported only $18,913.81

in income (R. 82a, 584a, 586a.); that he had stated to the agents in 1942 and again in 1950 that he had $12,300 of cash on hand in 1942; that his attorney had submitted to the agents a statement prepared by the petitioner's accountant, which disclosed cash on hand of $12,300 at the close of each year from 1943 through 1949; and that in 1950 the petitioner told the agents that he had never had more than $16,000 to $18,000 of cash on hand. (*Supra*, pp. 5-6.) These admissions were amply corroborated by (1) the testimony of a former employee of the petitioner that in 1949 she saw him tearing off parts of his cash register tapes, from which sales were recorded in the books (*Smith* v. *United States*, 348 U.S. 147, 159); (2) the financial statement filed with a bank in 1948, wherein the petitioner stated his undeposited cash at $18,634.22; and (3) the exhaustive receipts and expenditures analysis conducted by Treasury agents. The Government's estimate of $17,500 cash on hand at the end of 1947 was based firmly on the evidence, and all the net worth items except cash on hand were covered by the stipulation. (*Supra*, pp. 4-6.)

The petitioner's argument that he was not properly given credit for unreported income determined by the Internal Revenue Service for earlier years (Pet. 23-27) is plainly without substance. The determinations for the years 1944 through 1947 were made on the net worth method, and hence automatically gave the petitioner "credit" in his net worth for the unreported income. As for prior years, the petitioner was, in effect, also given credit for the unreported income

earned in years before 1944, because such income was reflected in his net worth increases and expenditures.[4]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

APRIL, 1959.

---

[4] The proof showed that for the years 1934 through 1943 the petitioner's net income was determined by the Internal Revenue Service as $82,053.17, involving a total income tax liability of $8,674.86. (R. 82a-83a, 584a-589a.) The petitioner's net worth as of December 31, 1943 (the real beginning point of Agent Keller's computations), was fixed at $60,471.74 ($48,171.74 of visible assets plus $12,300 cash on hand). (R. 117a-119a, 536a-537a.) Hence, the opening net worth with which the petitioner was credited by the Government was equal to his total income as corrected, after taxes, less some $1,300 per year for personal and living expenses. Moreover, even if this were not the case, no good reason appears for ignoring all the proof summarized in the preceding paragraph and indulging in the assumption that petitioner may have secreted more cash (from unreported income) than he claimed prior to trial.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 801021 1244

FILE COPY

APR 14

JAMES R. B... Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 750

FRANK DAVIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

JAMES C. HERNDON
SAM D. BATTISTA
830 Second National Bldg.,
Akron, Ohio,

ALAN Y. COLE,
815 Fifteenth Street, N. W.,
Washington 5, D. C.,

Attorneys for Petitioner

Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 750

FRANK DAVID, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

I. The Jencks Issue

In its Brief in Opposition, the Government has directed its argument primarily to a discussion of the merits of the *Jencks* issue presented by this case, but has nowhere addressed itself to the importance and substantiality of this issue. This ingenuous approach should not be permitted to obscure the fact that the question here presented can arise in every federal criminal tax case because in every such case: (1) the special agent in charge of a criminal tax investigation makes a report at the conclusion of his investigation; (2) exhibits are always attached to his

report; and (3) he invariably testifies as a Government witness at the trial.

The Government seeks to avoid the thrust of this important issue by three different contentions: first, that the exhibits do not constitute the "statement of the witness" within the meaning of subsection (e) of the *Jencks Act* (Br. in Opp., p. 7); second, that some of these exhibits were either introduced or made available in whole or in part at the trial (Br. in Opp., pp. 7-8); and third, that Petitioner did not specifically ask for particular exhibits or show how they "could conceivably have aided him in impeaching Keller" (Br. in Opp., p. 9). None of these contentions are valid.

A. Keller's report consisted of a letter of transmittal with exhibits attached. In the letter of transmittal, Keller referred to the various exhibits; and in the course of his direct examination he testified to the material contained in these exhibits. By so doing and by basing his computations on the figures and other information contained in these exhibits, he made the exhibits an integral part of his report of examination. The letter of transmittal and the exhibits *together* constituted "a written statement" made by the government witness "and signed *or otherwise adopted or approved by him*" under subsection (e) (1) of 18 U.S.C. § 3500.

Under 18 U.S.C. § 3500 the Government could no more refuse to produce the exhibits to Keller's report than it could refuse to produce the last few pages of Keller's letter of transmittal. The *Jencks Act* provides that if the Government claims that any statement contains matter which does not relate to the subject matter of the testimony of the witness, "the court shall order the United States to deliver such statement for

the inspection of the court in camera." (18 U.S.C. § 3500 (c)). In this case, the exhibits were never delivered to the court for an *in camera* inspection and the Government's failure to do so, and the failure of the courts below to require such production, constitutes—we believe—a violation of the *Jencks Act*, and requires reversal.

B. The Government seeks to avoid the consequences of this failure to comply with the requirements of the *Jencks Act* by arguing that "nine of the fourteen exhibits in question had been previously introduced into evidence at the trial; and three of the remaining five * * * were produced * * * subsequently * * *." (Br. in Opp., p. 7).

The quoted statement is significant because it flatly concedes that five of the exhibits attached to the Keller report were not made available to the defense at the conclusion of Keller's direct testimony.[1] It eliminates any dispute on this issue and makes it perfectly clear that Petitioner was unable to use these exhibits in

---

[1] Of the nine exhibits "previously introduced," six were copies of Petitioner's tax returns for the years 1944 through 1949, one was a certificate of Petitioner's income tax assessments and payments, one contained copies of Petitioner's financial statements prepared by his accountant, and one was the sworn statement of his accountant. None of these exhibits, with the possible exception of the last, was of significance for the purpose of cross-examining Keller.

Of the five exhibits withheld, on the other hand, one was the statement of an antagonistic witness (see fn. 3, p. 6, *infra*), one was the statement of Petitioner, one was the report of the Deputy Collector who had assisted in the investigation of Petitioner, one was a chronological list of conferences with Petitioner, and one contained the copies of net worth statements in prior examinations of Petitioner's return. These five exhibits, particularly the last, were extremely important for Petitioner's use in the cross-examination of Keller.

his cross-examination of Keller. That some of these exhibits were *later* produced or introduced does not vitiate the prejudice stemming from the trial court's failure to order them produced at the conclusion of Keller's direct testimony.

The plain intention of this Court's decision in *Jencks* v. *United States*, 353 U.S. 657, and the manifest purpose of the *Jencks Act*, was to insure that the statement of a Government witness would be made available at the conclusion of his direct testimony for use upon cross-examination. This procedure was clearly not followed at the trial of this case and, in consequence, Petitioner was deprived of five important exhibits for use in his cross-examination of Keller.

C. The Government has treated separately, and with somewhat greater particularity, the problems which arise with respect to two of the exhibits, L and N.

Exhibit L was described in the Keller report as "Copies of net worth statements prepared by agents of the Bureau of Internal Revenue in prior examinations of the tax-payer's return." This is all Petitioner has ever known about this particular exhibit. In its Brief in Opposition, the Government now tells us for the first time what Exhibit L in fact contains (Br. in Opp., pp. 1-9). It does so because it has a copy of the agent's report *with exhibits* in its own files and has made reference thereto for purpose of writing its Brief in Opposition. *But to this day Petitioner has never seen Exhibit L, nor have the courts below; nor, indeed, is the Exhibit presently available to this Court.*[2]

---

[2] "* * * rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, harmless." *Gordon* v. *United States*, 344 U.S. 414, 420.

By reference to its private files, the Government now describes what is contained in Exhibit L and states further that a portion of Exhibit L was in the possession of Petitioner at the time of trial. But Petitioner, at the trial, never knew that he had any portion of Exhibit L and obviously could not have requested the remainder of this Exhibit, as the Government suggests he should have done.

The requirements of the *Jencks* decision and the *Jencks Act* cannot be complied with in this *nunc pro tunc* fashion: the trial is over and Petitioner can no longer utilize the contents of Exhibit L for cross-examination of Special Agent Keller at this final stage of the proceeding.

Exhibit N raises a problem even more devastating to the Government's position. Petitioner has never seen a copy of Exhibit N, and the Government makes no claim that he has. The best the Government can say about Exhibit N is that it "was not produced at the trial or ever requested by the defense, nor does the petitioner even now make any effort to explain how it could conceivably have aided him in impeaching Keller or accomplishing any other purpose" (Br. in Opp., p. 9).

The record does not support the Government's first claim. A specific request was made by the defense for production of the letter of transmittal and all exhibits comprising Keller's report (151a). Furthermore, nothing in this Court's decision in the *Jencks* case, and nothing contained in the *Jencks Act*, even remotely suggests that the defense must make a showing as to how a witness' statement "could conceivably have aided in impeaching" a Government witness. On the contrary, this Court has held that:

"Because only the defense is adequately equipped to determine the effective use for purpose of discredifying the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

"The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved." 353 U.S. at 668-669.

The Government's argument with respect to Exhibit N is an effort to set the clock back and restore the law to a point prior in time both to this Court's decision in the *Jencks* case and the enactment of the *Jencks Act*. *Cf.*, *Bowman* v. *United States* (C.A. 6), 253 F. 2d. 933.

II. Likely Source

In responding to the question relating to "likely source," the Government has apparently adopted the role of the proverbial ostrich, hoping that by ignoring the question, it will fade away. It simply dismisses the problem by the cavalier observation: "There was no source problem in this case." (Br. in Opp., p. 10).[3]

[3] In its attempt to minimize the importance of the question of likely source, the Government relies heavily upon the testimony of a witness that she saw the defendant destroy cash register tapes (Br. in Opp., p. 11).

The uncontroverted evidence in this regard was that this witness did not work for Petitioner at any time during the indictment year 1948, and only commenced working after July 1, 1949 (283a-284a, 292a, 523a, 524a, 526a), the approximate date of the opening of the new restaurant. By this date all of the excess deposits, approximating the amount of the understatements had been deposited to Petitioner's checking account to pay for rebuilding the restaurant (Petition, p. 14).

If this case does not present an issue of "likely source," then it is difficult to envision a case that would. There is no claim that Petitioner was engaged in any undisclosed business, nor that he had any source of unreported income. The only issue is whether the claimed additional income did or did not come from his restaurant business during the indictment years.

The uncontroverted evidence is clear (1) that during the year 1948, Petitioner's restaurant business was closed for a period of time and that it was also operated at a temporary location where business was below normal; (2) that during the year 1949, Petitioner's business was closed for four months; and (3) that during these periods in 1948 and 1949, Petitioner deposited excess funds to his checking account, in the approximate amount of the alleged understatements, with the deposits correlating exactly with the dates of his entries to his safe-deposit box. In addition, there is the crucial admission of Special Agent Keller that he did not know until the trial was in progress that Petitioner's restaurant had been closed during the indictment years and that no income had been derived from it during periods of 1948 and 1949. In the light of this uncontradicted evidence, the requisite showing that Petitioner's business accounted for his increases in net worth during the indictment years was plainly absent. (See generally, Petition, pp. 28-30).

The gist of Petitioner's contention is (1) that the Government has assessed or claimed that Petitioner understated his income for the years 1942 through 1947; (2) that these understatements were not credited to Petitioner as a source of funds on hand as of the net worth starting point, December 31, 1947; and (3) that if Petitioner had been given credit for the unreported

income of pre-indictment years, his claimed cash on hand figure in the opening net worth would have been substantiated, and the Government's case destroyed.

The statement made by the Government in the last paragraph of its Brief (Br. in Opp., pp. 11-12) graphically portrays the fundamental error complained of by Petitioner. Since cash on hand, an essential item in net worth, was in dispute, the Government's net worth determinations for the years 1942 through 1947 could not "automatically" give Petitioner "credit" for the additional income computed by the Government for these pre-indictment years; particularly in view of the fact that Keller's "net available funds statement" (Petition, p. 11) was based solely on "income per returns" (119a-120a, 122a, 188a) and the net worth increase listed as an expenditure therein was based solely on "visible" assets. "Visible" assets obviously did not include cash on hand.

The basic error, which reaches to the heart of this issue, is contained in Keller's "net available funds statement". This statement, by failing to include the additional income from the pre-indictment years, and in particular the agreed additional income for the years 1942 and 1943, did not conform to the Government's own evidence, and did not fully state the facts as they were known to the Government. See *United States* v. *Altruda* (C.A. 2) 224 F. 2d 935. As this Court warned in *Holland* v. *United States* "* * * unless that increase [in net worth] can be reasonably allocated to the appropriate tax year the taxpayer may be convicted on counts of which he is innocent." 348 U.S. 121, 129.

The Government's failure to include the additional income computed by it for the pre-indictment years

denied Petitioner the benefit of this important source of funds from pre-indictment years. By omitting this substantial source of funds, the Government thereby failed to negative all non-taxable sources of funds and was clearly required, under *Holland* v. *United States*, *supra*, and *United States* v. *Massei*, 355 U.S. 595, to prove a "likely source" capable of accounting for the increases in net worth attributed to Petitioner for the indictment years.

CONCLUSION

For the foregoing reasons and for the reasons contained in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES C. HERNDON
SAM D. BARTEO,
430 Second National Bldg.,
Akron, Ohio.

ALAN Y. COLE,
815 Fifteenth Street, N. W.,
Washington 5, D. C.
Attorneys for Petitioner

FILE COPY

Supreme Court, U.S.
FILED
MAY 15 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 750

FRANK DAVIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

JAMES C. HUNSICKER
SAM D. BATTAGLIA
630 Second National Building
Akron, Ohio

ALAN Y. COLE
815 Fifteenth Street, N. W.
Washington 5, D. C.

Attorneys for Petitioner

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 750

FRANK DAVID, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of April 20, 1959 denying the petition for writ of certiorari, and that a writ of certiorari issue to review a judgment of the Court of Appeals for the Sixth Circuit in the above entitled case as prayed for in the petition filed March 4, 1959 herein.

STATEMENT

The principle question presented in the petition for certiorari in this case was whether the failure of the trial court to order production, even for purposes of an *in camera* inspection by the court, of the exhibits originally included and submitted to the Government as a part of a Government witness' report of examination violated the requirements of the *Jencks* Act, 18 U.S.C.

§ 3500, and the decision in *Jencks* v. *United States*, 353 U.S. 657, and constituted a denial of due process.

The Government witness was the special agent in charge of the investigation of Petitioner and the chief prosecution witness at the trial. His report of examination consisted of a letter of transmittal to which were attached certain exhibits. During the course of his direct testimony the witness testified to the material contained in the letter of transmittal and in the exhibits.

Upon Petitioner's demand, the trial court directed production of the report at the conclusion of the witness' direct testimony. When this report was examined by defense counsel, it became apparent that the Government had produced only the letter of transmittal but had removed therefrom all the exhibits originally attached thereto. Defense counsel then requested the court to direct the production of the removed exhibits, but the court—without even an *in camera* inspection of these exhibits—refused to do so.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. It was Petitioner's contention that the letter of transmittal and the exhibits together constituted "a written statement" made by the Government witness "and signed or otherwise adopted or approved by him" under sub-section (e)(1) of 18 U.S.C. § 3500; and in any event, constituted material to which Petitioner was entitled under this Court's decision in *Jencks* v. *United States, supra.*

Since the denial of the petition for certiorari in this case, oral argument was had in Nos. 435, 436, 437, 451,

and 471, all involving questions as to what constitutes a statement within the meaning of the *Jencks* Act and/or the *Jencks* decision. The argument in those cases reflected considerable concern on the part of the Court as to the scope and compass of the *Jencks* Act with respect to documentary materials other than or in addition to verbatim statements.

While the questions presented in those cases were closely related to the question presented in the instant case, it seems apparent from the arguments and briefs that the issue presented here will not necessarily be disposed of by the decisions in those cases. It is respectfully urged, therefore, that this Court consider specifically the question presented in this case so that this important aspect of the *Jencks* rule will be clearly delineated.

2. It was also Petitioner's contention that when a report of examination submitted by a Government witness is shown to relate to the witness' direct testimony, the *Jencks* Act requires that the trial court order production of the report in its entirety, at least for an *in camera* inspection by the court. This contention was predicated on the belief that under the *Jencks* Act, production for an *in camera* inspection is mandatory, and that the Act leaves no discretion in the trial court insofar as production for inspection by the court is concerned. Stated differently, once a report, or any part thereof, has been shown to relate to the direct testimony of a Government witness, the trial court *must* order its production. Only after the report has been produced, may the trial court exercise its discretion to remove material contained in the report. And only after the balance of the report has been submitted to the defense for its examination and use

may the trial court again exercise its discretion as to whether the documents or material contained therein are admissible, in the event that the defense seeks to offer them in evidence.

It has been the consistent position of Petitioner that it is important to distinguish between production for inspection *in camera* by the trial court, production for inspection by the defense, and admissibility into evidence. Demands for production by the trial court for an *in camera* inspection, demands for inspection by the defense, and offers in evidence, raise related issues, but independent ones. *Gordon v. United States*, 344 U.S. 414, 418. And this is especially true under the *Jencks* Act.

Government counsel, during argument in Nos. 435-437, appropriately conceded these distinctions, agreeing that there was a difference between documents which were admissible and documents which must be produced. "Form governs production, but context governs admissibility." 27 U.S.L.W. 3307, 3308 (May 5, 1959).

If the *Jencks* Act is to have any force and effect in preserving the rights of a defendant, it must be carefully applied. Material cannot be removed or excised from a report unless there has first been a careful inspection by the trial court. Yet the courts below—in denying this protection to Petitioner—have in substance held that a trial court may in its discretion permit material to be withheld by the prosecution without first examining it *in camera*, even though it relates to the direct testimony of the witness.

In the majority of cases construing the *Jencks* Act, the courts have been careful to indicate that the procedure established by the statute must be

followed with meticulous care, see e.g. *Scales* v. *United States* (C.A. 4, 1958) 260 F. 2d 21, 44; *Sells* v. *United States* (C.A. 10, 1959) 262 F. 2d 815, 823; *United States* v. *De Lucia* (C.A. 7, 1959) 262 F. 2d 610, 614; see also *United States* v. *Spangelet* (C.A. 2, 1958) 258 F. 2d 338, 341. Indeed, the fact that the *Jencks* Act requires an *in camera* inspection by the court, has been the primary reason given by the courts of appeals for sustaining the constitutionality of the Act.

> "Most significant is the fact that the new statutory procedure does not deny the defendant access to any information which would be helpful to his case. Production of the reports for inspection does not depend upon the permission of Government custodians or the attorneys for the prosecution; and the determination of what portions of the reports should be excised is not left to the Government but is entrusted to the impartial and experienced judgment not only of the trial judge but also the judges of the appellate courts and the Justices of the Supreme Court themselves, if in their discretion they determine to review the case. The standard set by Jencks, 353 U.S. at page 669, 77 S. Ct. at page 1014, that justice requires no less than that the defense be entitled to see the reports to determine what use may be made of them is satisfied; and justice requires no more." *Scales* v. *United States*, *supra*, 260 F. 2d at 43-44. See also *Sells* v. *United States*, *supra*, 262 F. 2d at 823; *United States* v. *De Lucia*, *supra*, 262 F. 2d at 614.

Furthermore, a careful examination of the legislative history of the *Jencks* Act indicates that the most significant factor in favor of passing the legislation was that a defendant would not be denied access to any information which could be helpful to his case.

By submitting the report of examination for *in camera* inspection by the trial court and thereafter permitting the trial court to excise certain material which may be relevant, the defendant's right to access would be kept open. See Senate Report No. 981, 85th Cong., 1st Sess. (1957).

The decisions of the courts below reflect a serious difference in interpretation as to the mandatory requirement of the *Jencks* Act for the production of reports of witnesses for *in camera* inspections.

3. Since the filing of the petition in this case, a decision has been reported in which the identical question presented in the petition for certiorari has been determined.

In *United States* v. *Franklin* (N.D. Ohio) 170 F. Supp. 503, which was a prosecution for violation of the cabaret tax provisions of the Internal Revenue Code (Title 26, U.S.C. § 1700 (e) I.R.C. of 1939, Title 26 U.S.C. § 4231 (6) I.R.C. of 1954), the defendant sought production of the reports of two special agents who testified at the trial. The reports were produced, but the exhibits attached to them were not. Without an *in camera* inspection of the exhibits, the court held in *Franklin*, as it did in this case, that the Government was not required to produce the exhibits. 170 F. Supp. at 505-506.

The decision in the *Franklin* case, following so closely after the decision in the instant case, indicates that the problem of whether exhibits may be removed from the statement of a Government witness prior to production, and without an *in camera* inspection by the trial court, is one which will arise with increasing frequency. Federal courts engaged in the trial of

criminal tax cases require a definitive interpretation at this time as to whether an agent's report with exhibits removed is sufficient production to satisfy the requirements of the *Jencks* rule. To let years go by and to await a cluster of cases going off in different directions is to encourage rather than dispel the confusion which this problem is now plainly engendering.

The question of whether the exhibits to an agent's report must be produced along with the report for the trial court's *in camera* inspection is, as pointed out in our petition, important to the general administration of criminal justice in the federal courts, and is of particular importance in the trial of criminal tax cases. It is standard procedure for the special agent in charge of a criminal tax investigation to make a report at the conclusion of his investigation. It is also standard procedure to attach as exhibits to this report the results of the agent's investigation. And, most important, the special agent in charge of an investigation invariably testifies as a Government witness at the trial.

We also pointed out in the petition that if the decisions of the courts below—holding that these exhibits need not be produced for an *in camera* inspection—represent a sound construction of the *Jencks* rule, it becomes a simple matter for the Government to establish a policy which could completely frustrate the purpose of the Act and the decision which gave rise to the Act. The Government need only provide that an agent's report be brief and perfunctory with the main substance relegated to exhibits. In this way, critical portions of an agent's report may be removed from the reach of a defendant.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JAMES C. HERNDON
SAM D. BARTLO
430 Second National Building
Akron, Ohio,

ALAN Y. COLE,
815 Fifteenth Street, N. W.
Washington 5, D. C.

Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58.2 of the Rules of this Court.

Counsel for Petitioner